No. 18-281

In the
Supreme Court of the United States

VIRGINIA HOUSE OF DELEGATES, M. KIRKLAND COX,
Appellants,

v.

GOLDEN BETHUNE-HILL, et al.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF

When this Court remanded this case, it gave the district court clear instructions: Conduct a "holistic analysis" of each of the 11 remaining challenged districts to determine whether the legislature's conceded use of a 55% black voting-age population ("BVAP") threshold dominated and controlled each district's design. Instead, the district court fixated on the conceded use of the BVAP threshold, categorically rejected *all* of the House's evidence, and myopically focused on particular line-drawing decisions it deemed race-based, while systematically ignoring multiple aspects of the districts that contradicted its narrative. Unsurprisingly, that skewed and decidedly non-holistic analysis led the court to conclude that race predominated in every district—even though the same court (albeit with one different member) had reached the opposite conclusion as to *every* district just two years earlier. The newly-constituted court then found that each district flunked strict scrutiny despite this Court's contrary conclusion concerning HD75, the only district it subjected to strict scrutiny.

Appellees' efforts to justify that remarkable about-face fall flat. As the United States explains, the district court's predominance analysis was woefully incomplete, and no amount of references to "clear error" review can paper over that legal error. Moreover, Appellees' defense of the district court's version of strict scrutiny fails to reconcile it with this Court's analysis of HD75 or any interest in giving state legislatures a ghost of a chance of complying with the competing demands of federal law.

Finally, the remedial map recently approved by the district court makes it unmistakable that this case does not present a choice between a race-conscious map and a judicial map that is race-neutral, or even one iota less race-conscious. Rather, the choice is between a duly-enacted, bipartisan-supported map that reflected a good-faith effort to comply with the Voting Rights Act ("VRA") and has governed four election cycles, and a judicially-imposed map that is race-conscious and fundamentally alters the political landscape in Virginia. That choice should be straightforward: This Court should reverse the judgment below and allow the people of Virginia to conduct the last election of the decade under the same bipartisan-supported and politically-accountable map that has governed since 2011.

I. The House Has Standing.

Appellees do not dispute that the House has been the proper party to defend the 2011 plan since the House intervened when the plan was first challenged four years ago. Nonetheless, they insist that the House lacks standing to appeal because it purportedly suffered no injury from a decision that ordered the House itself reconstituted by a special master from California. In their view, the attorney general—who has sat on the sidelines for years—has the sole power to appeal and an effective veto power over the 2011 plan. That position is legally and practically unsustainable.

1. Appellees curiously begin by arguing at length that an intervenor must have standing to appeal. AG.Br.14-20; App.Br.13. The House, of course, has conceded as much, *see* Op.Br.25, so their refrain that

intervention alone does not establish standing does nothing to advance the ball. But while the interests that justify intervention do not necessarily need to rise to the level of Article III injury, they often do. And, here, that is the case, which explains why, until this appeal, no one—not Appellees, the attorney general, or the district court—questioned the House's representations that this case implicates "vital interest[s]" unique to the House. JA2965-66.

To the contrary, the attorney general confirmed those interests when he told this Court during the first appeal that the House was better suited to defend "the redistricting legislation that [it] enacted" because executive officials "merely 'implement elections.'" JA2973. And those interests are even clearer now that the district court has ordered the House—not the Senate, the attorney general, or any executive agency—reconstituted in ways that profoundly disrupt its day-to-day operations. The House's enduring interests in its own composition and constituencies justified its intervention, and those interests, not the mere act of intervening, give the House standing to appeal.

That is clear from *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972). While the attorney general attempts to dismiss (or more accurately, discard) *Beens* as having erroneously held that the Minnesota senate had standing solely because it had intervened below, AG.Br.37, *Beens* in fact held that the senate had standing because "certainly the senate is directly affected by the District Court's orders" reconstituting the senate. 406 U.S. at 194. Indeed, *Beens* quoted a prior summary

affirmance for the proposition that a state senate was properly permitted "to intervene as a substantially interested party" in a malapportionment case "*because it would be directly affected by the decree of*" the district court invalidating its districting map. *Id.* (emphasis added) (quoting *Silver v. Jordan*, 241 F. Supp. 576 (S.D. Cal. 1964), *aff'd* 381 U.S. 415 (1965)).

The commonsense proposition that a legislative body is "directly affected" by legislation constituting its districts and judicial orders reconstituting them is confirmed by the Constitution, which assigns "the Legislature" and Congress authority over "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, §4. The Virginia Constitution likewise requires "the General Assembly" to establish the districts from which its members will be elected. Va. Const. art. II, §6. Those grants of power are a recognition of the reality that the legislature "certainly" has a direct stake in its own composition. After all, the legislature will operate very differently if districts are drawn to represent contiguous and compact constituencies versus disparate communities grouped together by an out-of-state professor. And the legislature and its day-to-day operations will be disrupted by court orders reconstituting the House in ways that create divided constituencies. The fact that comparable injuries are endured necessarily after a decennial census does not justify inflicting such injuries unnecessarily or make the injuries any less real.

The legislature's distinct and concrete interest in how it is constituted readily distinguishes districting legislation from run-of-the-mill laws that "affect

candidates' electoral prospects." US.Br.16. Apportionment legislation does not merely "impact" the institution's make-up, AG.Br.33; it defines it. That would be undeniable if a court order reduced the number of districts or imposed multi-member districts. A court order reconstituting the House's existing districts inflicts the same basic injury, with any differences matters of degree not kind, which renders efforts to distinguish *Beens* unavailing. AG.Br.38-39; App.Br.15-16; US.Br.16-17. Indeed, the summary affirmance *Beens* cited found the state senate's interest "directly affected" based on the redrawing of districts, not a reduction in their number.

Nothing in the cases on which Appellees rely casts doubt on the House's standing. Most did not even involve institutional standing. *Hollingsworth v. Perry* and *Diamond v. Charles* involved neither legislatures nor legislators, but "concerned bystanders" with no "direct stake" in the litigation. 570 U.S. 693, 712 (2013); 476 U.S. 54, 65 (1986). *Wittman v. Personhuballah* dealt with *individual* congressmen proceeding in their individual capacity and lacking individual injury because the court-ordered map there did not impair their individual reelection prospects, 136 S. Ct. 1732, 1737 (2016), not (as Appellees would have it) because an order invalidating a map causes legislatures "no cognizable harm," App.Br.14.

Nor did *Raines v. Byrd*, 521 U.S. 811 (1997), establish that an "'injury to [the] official authority or power'" of a legislature is categorically "non-cognizable." US.Br.15 (quoting *Raines*, 521 U.S. at 826). This Court already rejected that argument when

the federal executive branch pressed it in *Arizona State Legislature v. Arizona Independent Redistricting Commission* (*AIRC*), concluding that *Raines* addresses only the mismatch between plaintiff and injury when *individual* members seek to vindicate an *institutional* injury, and that "an institutional plaintiff" can "assert[] an institutional injury." 135 S. Ct. 2652, 2664 (2015); *see also INS v. Chadha*, 462 U.S. 919, 919 n.*, 929-31 & nn.5-6, 939-40 (1983) (concluding, contrary to attorney general's claims, AG.Br.40-41, that each House of Congress had standing).[1] Here, as in *AIRC*, there is a perfect match between the House and the institutional interests it seeks to vindicate. As much as the executive branch may wish legislative standing did not exist, this Court has repeatedly declined its overtures to embrace that proposition.[2]

Finally, Appellees' suggestion that the House lacks standing because the interests it asserts belong to its members is wrong twice over. As explained, the House has distinct *institutional* interests. But the House, just like any institution, represents its members too. Indeed, *Raines* expresses a preference

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[1] The attorney general tries to distinguish *AIRC* as a case brought by the full legislature rather than just one chamber, but in *AIRC*, it was the full state legislature whose institutional interests were infringed. Here, as in *Beens*, the reconstitution of a legislative chamber inflicts a distinct injury on that chamber, which is why *Beens* expresaly rejected the proposition that only the full legislature had standing. 406 U.S. at 193-94.

[2] To the extent the United States' concerns are animated by concerns over "lawsuits by ... the Houses of Congress" against the executive branch, US.Br.8, they are misplaced, as such disputes present distinct separation-of-powers concerns not present here. *See AIRC*, 135 S. Ct. at 2665 n.12.

against suits by individual members, and the prospect of this litigation being conducted by several individual members (such as the Speaker, whose district was the most substantially reconfigured by the special master[3]), and not the House, is not a happy one. Ultimately, Appellees' argument reflects their view that districting impacts only the reelection prospects of individual members and not the day-to-day operations of the House. But elections are a means to facilitate the actual operation of representative government, not an end in themselves. The decision below distorts the House's day-to-day efforts to provide representative government for the people of Virginia, and the House is an adequate—indeed, ideal—litigant to vindicate that interest.

2. The House also has standing to defend the State's interests. That conclusion flows directly from *Karcher v. May*, 484 U.S. 72, 81-82 (1987). The attorney general contends that, because the House intervened to defend its institutional interests, *Karcher* precludes it from defending the State's interests too. AG.Br.21-23. That misreads *Karcher* and misrepresents the history of this case. The problem in *Karcher* was not that the legislators tried to switch horses between institutional interests when the case reached this Court. It was that, by that time, they no longer served in the offices that gave them "authority ... to represent the State's interests in both the District Court and the Court of Appeals." *Karcher*, 484 U.S. at 82. Here, by contrast, the House is and

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[3] *See* Appendix to Jurisdictional Statement at 231, *Va. House of Delegates v. Bethune-Hill*, No. 18-___ (U.S.) (filed Feb. 27, 2019).

always has been the House. And while its own institutional interests certainly animated its intervention and continue to support its standing, the House has always represented *both* its own interests *and* the State's interests. Indeed, if the attorney general did not understand the House to be representing the State's interests, it is hard to understand how he could have sat on the sidelines for the past four years, including when the validity of state legislation was at issue before this Court. It is thus far too late in the day for the attorney general to claim that the House lacks the power to represent the State's interests.

The attorney general next claims that *Karcher* is inapposite because it did not address whether the legislators "had standing to appeal to the court of appeals" *before* they lost their official capacities. AG.Br.26. As the quote reproduced above confirms, that is simply wrong. Moreover, as Justice White underscored, by declining to vacate the court of appeals' decision, the Court necessarily concluded that the legislators *did* have standing to represent the State in appealing the adverse district court decision. *Karcher*, 484 U.S. at 83 (White, J., concurring). The United States contends that the Court was addressing only whether the legislators could "litigate on behalf of *the legislature*," not whether they could "litigate on behalf of *the State*." US.Br.13. In fact, the Court specifically concluded that the legislators "had authority ... to represent the State's interests," *Karcher*, 484 U.S. at 82, as the United States itself previously recognized, *see* Br. for United States (Jurisdiction) 30, *United States v. Windsor*, No. 12-307 (U.S. Feb. 22, 2013) (*Karcher* involved "a specific

authorization ... for particular legislative officers ... to represent the State's interests"). Ultimately, then, one can deny the House's standing to represent the State's interests only by denying *Karcher*'s existence—as Appellees do by declining to cite it.

In sum, this Court should reject the executive branch's belated effort to exercise retroactive veto power over a bipartisan-supported districting plan. Holding that the House lacks standing would encourage partisan gamesmanship of the worst sort. Whenever there is divided government, voters of the same party as the executive could use the courts to short-circuit the democratic process and undermine the institutional interests of the legislature. That stratagem does not even depend on initial success in the district court. Just this past month, Michigan's newly-elected Democratic Secretary of State sought to settle a partisan gerrymandering suit filed by Democratic voters by asking a court to redraw districts enacted by the Republican legislature—before the court even found any constitutional violation. *See* Jonathan Oosting, *Benson Seeks to Settle Federal Gerrymandering Case*, The Detroit News (Jan. 17, 2019), https://bit.ly/2SoQUjq. There is no need to incentivize such anti-democratic litigation or deny that state legislatures have distinct interests when courts are asked to invalidate maps and reconstitute representative bodies.

II. Race Did Not Predominate In These Decades-Old Majority-Minority Districts.

Appellees' support from the attorney general and the United States disappears when it comes to the merits. And for good reason: As the United States

explains, the district court's analysis cannot be reconciled with the instructions this Court gave last time around.

A. The District Court's Predominance Analysis Was Flawed From the Start.

The district court failed to adhere to this Court's repeated admonitions that "courts must 'exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.'" *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). While Appellees' gamely try to defend the court's wholesale refusal to even *credit* the House's evidence, let alone to give the legislature a presumption of good faith, there is no escaping the conclusion that the court "failed to apply the demanding analysis that this Court['s predominance jurisprudence] requires." US.Br.21.

Appellees first try to defend the court's effort to condemn the House for its "admission" that it sought to comply with the VRA, claiming that this Court has done the same. App.Br.24. But their support for that proposition is two citations to the *fact* sections of opinions that did not find that race predominated, let alone embrace the startling proposition that prioritizing compliance with federal law is somehow constitutionally suspect. App.Br.24 (citing *Bethune-Hill*, 137 S. Ct. at 795, and *Ala. Legislative Black Caucus v. Alabama* (*ALBC*), 135 S. Ct. 1257, 1263 (2015)).

Appellees next claim that the United States embraced that proposition in *Personhuballah*. In fact, the United States' brief said the opposite:

"[R]ecognizing the VRA as a binding requirement simply demonstrates 'obedience to the Supremacy Clause.'" Br. of United States as Amicus Curiae 21, *Personhuballah*, No. 14-1504 (U.S. Feb. 3, 2016). Appellees likewise try to defend the district court's fixation on the legislature's conceded use of a 55% BVAP threshold, but as the United States explains, that fixation is precisely what led the court to abandon a "holistic" analysis and to "erroneously decline[] to consider the flexibility that the legislature had in drawing specific districts." US.Br.23-24.

The district court went even further astray when it refused to credit *any* of the House's evidence. Appellees attempt to insulate that remarkable result from review by labeling it a "credibility finding," but the problem is not simply that the court got its credibility findings wrong (although it certainly did). It is that it ignored (indeed, reversed) this Court's precedents by effectively employing a presumption of *bad faith* when it came to any evidence the House provided, while taking everything Appellees had to say at face value. There is no better illustration of that than the court's decision to reject as "post hoc rationalization" the testimony from any House witness who did not testify at the first trial, JS.App.33, while simultaneously crediting all the witnesses that *Appellees* called for the first time at the second trial. Appellees try to dismiss this as "an apples-to-oranges comparison" because their witnesses were "rebutt[ing]" Delegate Jones, App.Br.29-30, but that rebuttal was not limited to Delegate Jones' *new* testimony. Thus, this is not an issue of apples and oranges, but of geese and ganders. There is no justification for applying a one-sided rule

to distort the proceedings and rob the House of its presumption of good faith.

Appellees likewise have no answer to the district court's equally arbitrary claim that the new *legal* standard governing the remand somehow entitled the newly-constituted district court to reverse *credibility* findings regarding testimony *from the first trial*—including an expert *unanimously* found not credible at the first trial. *See* JS.App.13. Instead, Appellees simply ignore that incoherent reversal.

B. Appellees' District-Specific Defenses Confirm the District Court's Failure to Conduct a Holistic Analysis.

The court failed to conduct the holistic analysis of *all* aspects of the challenged districts that this Court commanded. *Bethune-Hill*, 137 S. Ct. at 800; *accord* US.Br.18-33. Instead, the newly-constituted court essentially committed the same error as the first panel in reverse, focusing myopically on any line-drawing decision it could characterize as motivated by race, while ignoring every aspect of the districts that did not fit its narrative. In reality, a genuinely holistic analysis readily confirms that race did not predominate in any districts.

1. Richmond (HD69, HD70, HD71, HD74)

a. Appellees start by arguing that HD69, which began with a 56.3% BVAP and ended with a 55.2% BVAP, JA640, "vividly" illustrates "a clear []racial pattern." App.Br.38. As the United States explains, however, "44.7% of the voting-age persons moved into the district were African-American, as compared with 43.5% of those moved out." US.Br.27. That is hardly

the kind of "stark split[] in the racial composition of populations" necessary to support a predominance finding. *Bethune-Hill*, 137 S. Ct. at 800; *cf. ALBC*, 135 S. Ct. at 1263 (15,785 individuals added to a district, of whom only 36 were white). Moreover, Appellees and the district court ignore that the line-drawing decisions for HD69 *as a whole* made the district more Richmond-centric, improved compactness, "eliminated irregular prior boundaries," and "reunified" split precincts. US.Br.28; Op.Br.38-39.

b. Appellees' attack on HD70, which began with a 61.8% BVAP and ended with a 56.4% BVAP, JA640, is similarly flawed. They primarily complain that two high-BVAP precincts were moved *from* HD70 to HD69 and that three more were moved to HD71 to help *those* districts remain above the 55% threshold. App.Br.36-37. But as the United States explains, that guilt-by-association theory fails to abide by this Court's instruction that the analysis must focus on the district *at hand*. US.Br.31-33. Moreover, these movements furthered obvious community-of-interests considerations: "[P]opulation shifts from District 70 aligned neighboring District 69 with the James River, and better aligned neighboring District 71 with the Richmond border." US.Br.29 (citation omitted). Appellees cannot satisfy their burden by labeling movements easily explained by traditional districting principles as "donations" to other districts.

c. As for HD71, Appellees emphasize its increase in BVAP and Delegate Jones' "admission" that its design was "impacted" by the 55% threshold. App.Br.34-35. Again, however, that is just evidence that race was *a factor*, not that it *predominated*.

Appellees take issue with three particular line-drawing decisions, but they (like the district court) never "discuss[] the degree to which [HD71] reflects other traditional districting criteria." US.Br.26. They never mention that HD71 improved its compactness, JA638, retained over 80% of its core, JA1090, and sits in the same political subdivisions as before, JA639. That "unduly narrow focus" is not the holistic analysis this Court commanded. US.Br.27.

d. As for HD74, Appellees notably do not defend the district court's inference of racial motive from HD74's "irregular shape"—presumably because HD74 "maintained the same bizarre shape and low compactness score under both the 2001 and 2011 plans." JS.App.54; JA638. Instead, they revert to their guilt-by-association theory, maintaining that black voters left HD74 in higher numbers than they were added to help meet 55% BVAP targets in *other* districts. App.Br.39. That argument is legally flawed and hard to square with the reality that HD74 emerged with a BVAP 2.2% *above* 55%. JA640.

2. North Hampton Roads (HD92, HD95)

a. Like the district court, Appellees do not identify *any* deviation from traditional districting principles in HD92. Instead, once again, they just claim that HD92 was impacted by purported efforts to gerrymander *HD95*. Even setting aside the problems with that "spillover effect" theory, this Court has *never* affirmed a predominance finding for a district "without evidence that some district lines deviated from traditional principles." *Bethune-Hill*, 137 S. Ct. at 799. A district that began with a 62.1% BVAP, ended with a 60.7% BVAP, stayed within the same political

subdivisions, improved its compactness, and decreased its VTD splits to zero is hardly the place to start.

b. Appellees' attack on HD95—which began with a 61.6% BVAP, ended with a 60.0% BVAP, and stayed within the same political subdivisions, JA639-40—fares no better. They essentially just parrot the district court, App.Br.40-41, which itself parroted Appellees' "dot density" expert, JS.App.59-60. But that expert himself explained that "the[] little squibbles" in HD95's design about which Appellees complain were not "crucial" to keeping the district's BVAP above 55%—which is hardly surprising since the district began and ended well above that number. HD95 thus is a perfect illustration of the fact that the 55% threshold simply was "not particularly constraining," and did not cause race to predominate. US.Br.22.

3. South Hampton Roads (HD77, HD80, HD89, HD90)

a. In HD77, Appellees accuse the House of "reweigh[ing] the evidence." App.Br.46. But it is legal, not evidentiary, error to "infer" predominance from HD77's "odd shape" and "low compactness score" when the legislature simply "retained this general shape and low compactness score" from the benchmark plan, JS.App.73, 76, and moved *away* from the BVAP target, from 57.6% to 58.8%, JA640. Ultimately, Appellees' attack on HD77 again rests on the "spillover impact" of purported race-based decisions *in HD90*. App.Br.45. But that repeats the legal error made elsewhere: failing to focus on the "the district at issue." *Bethune-Hill*, 138 S. Ct. at 800.

b. As for HD90, the BVAP of which declined a whopping 0.03% to 56.6%, JA640, Appellees never acknowledge that the district improved its compactness; indeed, only 16 House districts statewide were more compact. JA638, 1084-87. Nor do they mention that HD90 decreased split municipalities and complies with other traditional districting principles. JS.App.77. And while Appellees declare the VTD splits "obviously" racial, not even their "dot density maps" corroborate that claim. JA2704-05.

c. Turning to HD80—which began 0.6% below the 55% BVAP threshold, emerged 1.3% above it, and eliminated one of its two VTD splits, JA638, 640—Appellees insist that race predominated because a new "appendage" "conspicuously winds around low BVAP precincts ... to capture high BVAP precincts." App.Br.43. But the new appendage just used the then-"current configuration" from HD79, JS.App.175, a fact that Appellees and the district court conspicuously omit. They similarly omit that these "bizarre" lines skirt around the residences of two incumbents, JA1514, and that the "low-BVAP precincts" are actually "very Republican" precincts *in the home district of Delegate Jones*, who had an obvious non-racial interest in avoiding self-inflicted political damage, JS.App.174; JA1440. Thus, the notion that HD80 "cannot be explained" by traditional redistricting principles is fantasy. JS.App.68.

d. As for HD89, Appellees emphasize the addition of a high-BVAP VTD that created a water crossing. App.Br.44. But like the district court, Appellees ignore that *the city* comprising HD89 *also crossed the*

river at that VTD; the redistricting thus "*corrected* a water crossing." JS.App.176 n.39. They next pounce on the removal of one low-BVAP VTD on the opposite side of the district, suggesting the legislature made a racially offsetting move. App.Br.44. But that conclusion improperly considers those VTDs "in a vacuum," and ignores low-BVAP VTDs added elsewhere in the district, JS.App.70, 182-83; JA2700. Appellees thus are left to rely on two VTD splits that added black voters. But two VTD splits alone do not establish predominance.

4. Southside Virginia (HD63)

Finally, Appellees argue that race predominated in HD63 largely because the legislature split a county in the western portion of the district and added territory in the east. App.Br.33-34. As their own expert highlighted, however, HD63 started with a 58.1% BVAP and emerged with a 59.5% BVAP, so "this is a situation where [the district] could have been drawn in a number of different ways to reach th[e BVAP] target." JA3163. As elsewhere, then, that target did not impose a significant constraint, let alone force the legislature to subordinate traditional criteria to race. HD63 therefore underscores the fundamental problem: The district court plainly failed to conduct a holistic analysis to determine whether "the legislature subordinated traditional race-neutral districting principles ... to racial considerations." *Bethune-Hill*, 137 S. Ct. at 797.

III. Each District Would Satisfy Strict Scrutiny.

While this Court can resolve this case on predominance grounds, it can also follow the path it charted when upholding HD75: assume *arguendo*

that race predominated and conclude that the legislature had the requisite "good reasons" to believe that a 55% BVAP threshold was needed to prevent retrogression under §5. *Bethune-Hill*, 137 S. Ct. at 802. Appellees' attempts to resist that conclusion once again "ask too much from state officials charged with the sensitive duty of reapportioning legislative districts." *Id.*

Appellees have never disputed "that compliance with §5 ... was a compelling government interest" in 2011. *Id.* at 803 (Alito, J, concurring). Instead, they contend only that the House lacked "good reasons" to believe that maintaining a 55% BVAP was necessary to comply with §5 in *any* of the challenged districts. That argument does not take seriously the significant constraints that §5 imposed. Because most of these districts were already performing majority-minority districts with BVAPs above 55%, the legislature would have had the burden under §5 of *affirmatively proving* that decreasing their BVAPs below their benchmark above-55% levels would not "have a significant impact on the black voters' ability to elect their preferred candidate." *Bethune-Hill*, 137 S. Ct. at 802; *see Georgia v. Ashcroft*, 539 U.S. 461, 493-94 (2003) (Souter, J., dissenting). Speculation that a slightly lower BVAP also might have worked is no answer when the House's burden would be to prove that black voters could have elected their candidates of choice *even without* a 55% BVAP.

That was a tall order indeed given the record and voting dynamics in Virginia. As this Court recognized last time around, unlike a shift from "70% to 65%," "reducing the BVAP below 55% well might have" "a

significant impact on the black voters' ability to elect their preferred candidate." *Bethune-Hill*, 137 S. Ct. at 802. Indeed, one member of the House Black Caucus voted against the 2011 plan because she thought the 55% BVAP was too low. JA483-84. Even Appellees maintain that §5 required *all* these districts to remain "healthy performing majority-minority districts," JA2232—*i.e.*, to have BVAPs above 50%. And Appellees do not dispute that the most reliable data for assessing retrogression—contested House primary results—did not exist for most districts or that Virginia voter registration records do not reference race. Op.Br.54. In the absence of the kind of data that would have been needed to measure retrogression with any real precision, it is hard to fathom how a legislature could be faulted for concluding that it would have a difficult time carrying its burden of proving that *reducing* the BVAP in *pre-existing* majority-minority districts below the 55% benchmark would not have any retrogressive effects.

Instead of focusing on that question, Appellees fixate on the conceded fact that the legislature selected the same threshold for each district, and (like the district court) fault Delegate Jones for failing to "'undertake *any* individualized functional analysis'" of each district. App.Br.50 (quoting JS.App.96). But Appellees' attempts to bolster that accusation succeed only in refuting it. For example, Appellees fault Delegate Jones for failing to "compile" recent election results from the districts. App.Br.51. But Delegate Jones had an encyclopedic knowledge of election results, JA1765, 1921-28, and neither Appellees nor the district court have ever suggested that he ignored any relevant election result when assessing

retrogression. They complain only that he did not "compile" a comprehensive administrative record of the results he considered. App.Br.51. But there is no compilation requirement, just a requirement to *conduct* a functional analysis. Piling on additional procedural obligations is precisely what this Court has already rejected. *Bethune-Hill*, 137 S. Ct. at 802.

Appellees never deny that Delegate Jones "'met extensively' with 'virtually every member of the Black Caucus to get input.'" App.Br.54 (quoting Op.Br.54). Instead, they just protest that a few of those members testified (seven years later) that they did not recall telling him that their districts "required" a 55% BVAP. App.Br.51 (quoting JS.App.89). That quibbling does not support the claim that he failed to conduct "*any* analysis" of the districts. Moreover, those witnesses' "post hoc rationalization[s]," JS.App.33, are difficult to reconcile with the contemporaneous record. After all, one of the same delegates who testified in 2017 that she did *not* believe a 55% BVAP was necessary stated *on the House floor* in 2011 the challenged districts "need 55 percent at least ... [b]ecause a lot of us know that statistics show that we don't always vote." JA346. Appellees try to explain that away by claiming that her 2011 statement was "based on *Jones'* representations," App.Br.51, but that claim is belied by Delegate Dance's observations that, in her own *personal* experience, nearly 50% of African-American voters do not vote, JA346, and her views were strongly corroborated by another delegate who voted against the 2011 plan because she thought 55% was too low, JA483-84.

Indeed, conspicuously absent from the record is any evidence that *any* of the delegates Appellees called for the first time at the second trial expressed any *contemporaneous* concern to their colleagues that the 55% BVAP threshold was inconsistent with their knowledge of election results or voting patterns in their districts. And far from raising concerns that Delegate Jones failed to gather sufficient evidence, the only delegates from the challenged districts who spoke on the House floor *commended* Delegate Jones for being "willing to listen to anything and everything that we throw to him." JA344-45; *see also* JA445 ("[L]ook at who has worked with us to try to make sure that we maintain what we've got. ... That person has been Delegate Chris Jones.").

Ultimately, like the district court, Appellees' real complaint is not that Delegate Jones failed to *conduct* any district-specific analysis, but that he should have weighed the district-specific evidence differently. They think he should have given more weight to general election results in the House and considered results from elections for entirely different offices. App.Br.52-54. But the choices Delegate Jones made as to those factors for the 11 districts now at issue are the same choices this Court validated when it came to HD75. And rightly so, as the whole point of the "good reasons" test is to account for the reality that "standards of §5 are complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and, with respect to any particular district, judges may disagree about the proper outcome." *ALBC*, 135 S. Ct. at 1273.

Here, the legislature certainly had good reasons for doubting that studies of inapposite statewide elections would suffice to satisfy its §5 burden to prove that reducing the BVAP of pre-existing majority-minority districts below 55% would not create a serious risk of retrogression. After all, Appellees' own expert agreed that voting patterns of white and black voters do *not* overlap even in statewide elections. *See* JA2788. Indeed as the House's experts explained, statewide election trends confirm the existence of "[r]acially polarized voting[,] .... particularly in the regions that contain many of the challenged districts." JA2288; JA2328-30.

Appellees conclude with the doubly disingenuous claim that upholding the 2011 plan would authorize Virginia to "redistrict based on race with impunity forever." App.Br.54. First, no one has ever disputed that the legislature's consideration of race in 2011 was animated by §5, which will not apply the next time the legislature redistricts. Second, Appellees have *never* suggested that the legislature should have drawn a race-blind map. To the contrary, they were the first to insist that all 12 of the districts they challenged had to remain "healthy performing majority-minority districts." JA2232.

This case thus has never been about *whether* race should be used. It has only ever been about *how* race should be used, and who should consider it in drawing maps—popularly-elected and politically-accountable legislators or Article III courts and out-of-state special masters. Indeed, now more than ever, the choice for this Court is between two maps that *both* consciously considered race to ensure that minority voters could

elect their candidates of choice. *See* Jurisdictional Statement, *Va. House of Delegates v. Bethune-Hill*, No. 18-___ (U.S.) (filed Feb. 27, 2019) (appealing district court's order imposing remedial plan); ECF 361 at 10 n.6 (finding that "black voters will retain their ability to elect their preferred candidates under the [remedial] plan"). One is a bipartisan-supported plan that has governed the last four elections and was designed by politically-accountable representatives of the people of Virginia who made a good-faith effort to comply with federal law by preserving 12 long-standing majority-minority districts. The other is a court-imposed plan designed by a politically-unaccountable professor from California who used a 55% BVAP as a ceiling rather than a floor in redrawing seven of the districts as majority-minority districts, and then considered race at a more granular level to convert the remaining four into "crossover" districts, in service of making new "influence" districts out of districts that were never challenged. *See* ECF 361 at 17 n.12, 33; ECF 360 at 36-37, 78, 89, 96, 101.

While the House had a compelling interest in ensuring that the BVAP in each district was *at least* 55%, the special master had no coherent reason for ensuring that the BVAP was *below* 55% in each of 12 pre-existing majority-minority districts, as this was never a "packing" case. The court-imposed plan does not even succeed in reversing the majority of line-drawing decisions identified as racially motivated, but does succeed in considering race more extensively. This is particularly obvious at a district-specific level. Take, for example, HD92, which the 2011 plan took from a 62.1% BVAP to a 60.7% BVAP, and which the court-imposed map has now substantially

reconfigured to a 53.87% BVAP. *Compare* JA640 *with* ECF 361 at 29.

The choice between those maps should not be close. The 2011 plan is less race-conscious and has the inestimable advantage of being enacted by the people's representatives. If the people of Virginia have no choice but to hold the last election of the decennial cycle under a race-conscious map, then they should at least get to hold that election under a race-conscious map that garnered super-majority support from the Virginians that they elected to represent them.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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